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CASES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 288

THE UNITED STATES, APPELLANT

v.

SWIFT & COMPANY

No. 289

SWIFT & COMPANY, APPELLANT

v.

THE UNITED STATES

CROSS APPEALS FROM THE COURT OF CLAIMS

REPLY BRIEF OF THE UNITED STATES

I

There was no error in the judgment of the Court of Claims in holding that the claimant was not entitled to recover alleged damage with reference to the cured but unsmoked bacon sold in Europe

On March 5, 1919 (R. 41, Finding XIX), General Kniskern, by O. F. Skiles, advised claimant by letter that no issue bacon (together with certain

other packing-house products) above the quantities noted on February contracts would be required by his office; that any issue bacon then in smoke in excess of February delivery would be accepted; that it was the intention of his office to enter into negotiations with the claimant "with a view of making settlement for such material as you now actually have on hand *which can not be utilized after completion of the February contracts.*" (Italics ours.)

He further advised, "You are instructed to use every effort to dispose of such material as you now have on hand, in order that adjustment may be quickly made."

It further appears that, as of March 5, 1919 (R. 45, Finding XXIII), the claimant had in process of cure, but unsmoked, 1,068,539 pounds of bellies, of which 417,881 pounds were in preparation by claimant and 650,658 pounds by Squire & Company for the account of claimant.

Thereafter, the claimant proceeded to dispose of the stated 1,068,539 pounds of bellies, and the manner of such disposition and the prices received therefrom are set out in detail at page 51 of the Record (Finding XXX).

The facts of such disposition and the prices received were as follows:

That 417,881 pounds of the bellies were allowed to remain in cure for from 78 to 86 days. (R. 46.)

That during the month of May, 1919, 56,900 pounds of the bellies were sold in the United States for New York delivery substantially at the price of 34 cents per pound. Likewise, claimant slightly smoked 8,325 pounds of the bellies and disposed of them to its southern trade at prices netting 31 cents per pound; 1,003,314 pounds were shipped to Europe, such shipments being made principally from April to June, 1919, with the major portion sold abroad thereafter throughout the last quarter of the year 1919, although some sales were made in January, 1920. Of the total shipments, 820,622 pounds were sold in France at a price which netted 12.30 cents per pound.

The court below (R. 83) in its opinion reaches the conclusion that it was the duty of the claimant "to have relied upon the home market and to have taken such steps that it might show that it had exhausted that market before resorting to a foreign one, and that, in the absence of such showing, it assumed the risk of procuring such results as would demonstrate that the course taken had resulted beneficially to the other party."

There is no finding of fact which shows that such efforts had been made to exhaust the home market. The finding is that sales were made in substantial quantities on the New York market in May at prices which netted about 34 cents per pound. Further, that after slight smoking, sales were made

in southern territory by the claimant at prices which netted about 31 cents per pound.

The distressing condition of European affairs, both commercial and financial, was well known as of that time. A resort to that market for the disposition of the product here involved must necessarily have been of a speculative character, in so far as the outcome of the project could be foreseen. The claimant took the risk of this speculative project and may not now charge the Government with the unfortunate results of its own adventure, or possibly misadventure. The court below in its opinion (R. 83), in regard to this particular transaction, reaches the conclusion that claimant probably acted in good faith in resorting to shipment of the unsmoked bacon. But good faith alone is not sufficient to fix a claim of damages against the Government on conditions here disclosed.

Claimant has cited 2 Williston on Sales, 2d Edition, section 547, p. 1371, to the effect that the law " is satisfied with a fair sale made in good faith *according to established business methods.*" It is obvious that this authority is not here applicable, because this claimant followed no established business methods in departing from the domestic market and seeking a market for these products in the disorganized countries of Europe.

The case of *Waples & Company* v. *Overaker & Company*, 72 Tex. 7, 13 S. W. 527, decided by the

Supreme Court of Texas, is also quoted from to the effect that—

> It is the duty of the seller in such a case to exercise good faith and to realize the best price he can on resale; but, if in the light of the facts before him, obtained in the exercise of due diligence, he pursues the course *which prudence would indicate to a man of ordinary prudence,* then the defaulting buyer ought not to be heard to say that the market on which the thing was sold was not in fact the most advantageous one.

The very language here quoted states a principle which prevents recovery by this claimant. That principle is that the seller must pursue a course which prudence would indicate to a man of ordinary prudence. It is clear under the conditions existing in May, 1919, in the domestic market and in the European markets, that the domestic market would have suggested itself to a man of ordinary prudence, claiming to be dealing on behalf of another, and that other the Government.

Claimant has referred to the cases of *A. B. Small & Company* v. *American Sugar Refining Company* (267 U. S. 233) and *A. B. Small & Company* v. *Lamborn & Company* (267 U. S. 248), both decided March 2, 1925, by this court. Examination of these cases discloses facts which make the doctrines there announced inapplicable to the case at bar.

In *Small* v. *American Sugar Refining Company,* all of the sugar had been delivered to the common carrier for shipment to the vendee, and the vendor subsequently repossessed itself of the sugar and made sale of the same after default by the vendee. There was no allegation of any undue delay or lack of diligence in such sale. The evidence offered as to better prices covered sales made in small quantities. There was no substantial showing of inadequate resale price.

In *Small* v. *Lamborn & Company,* part delivery had been made to the vendee and part delivery to the carrier to be shipped to the vendee, and a part remained to be so delivered when the vendee breached the contract. Likewise, evidence as to inadequate resale price was of the same character as above discussed. This Court held that the evidence of inadequate resale price was not of a character to affect the fairness of that resale price.

In both cases this Court said the true question was whether " the resale was fairly made in a reasonably diligent effort to obtain a good price." In these cited cases, the resales were made in the territory and on the domestic market in which the original sales were to take effect. In the case at bar, the sales made by this claimant were in foreign countries and in foreign markets, both of which were badly disorganized and disrupted in a commercial and financial sense, and the prices received were entirely inadequate as compared with the prices for the same product which had previously

been disposed of in the domestic markets of the United States where the original alleged sale was to have taken place.

It is evident that the declarations of this Court in the two cited cases have no application to the state of facts here under consideration.

General Kniskern, in the letter of March 5, 1919 (R. 41), did direct claimant to dispose of such material as it then had on hand; but no construction could be placed upon the letter of that date which would authorize claimant to make disposition in a foreign country. That General Kniskern intended no such construction to be placed thereon is evident from the contents of his letter of August 29 (R. 48), where, in express terms, unofficially, he suggests that sales be made in the United States.

In this connection, claimant has made the point that the court below was probably misled in the belief that the claimant had been advised by General Kniskern to sell this particular product, the bellies, within the United States, because the letter of August 29, 1919, is claimed to refer only to Army bacon completely cured and smoked.

Examination of this letter from General Kniskern to claimant discloses that no positive and certain construction can be placed thereon, and it might well be held that General Kniskern was advising this claimant generally as to the disposition to be made of all products prior to the submission of its claim for damages.

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The contention is likewise made that these particular bellies had been shipped abroad previous to August 29, 1919.

Reference to the finding of facts relative to the disposition and shipment of this particular product (R. 52) discloses two facts of importance, namely, that while, as a matter of fact, the bellies in question had been shipped abroad previous to that date, the larger part of the sales of the bellies made abroad were subsequent to that date (R. 52); and, further, there is no finding in the record that the Government had any notice of the shipment and attempted foreign sale of the bellies in question, either at the time the letter of August 29, 1919, was written or at any previous date.

The claimant in its brief (p. 152) quotes from *United States* v. *Behan,* 110 U. S. 338. Examination of this quotation shows that it is not in point in this particular instance, for the reason that the Court in that part of its opinion quoted is not dealing with the subsequent disposition of the materials obtained to carry on the cancelled contract with the Government there involved, but is dealing with the contention that the claimant in that case ought to recover for its *losses and expenditures.* The Court found these were incurred in an endeavor to perform the contract, and then adds " if they were foolishly or unreasonably incurred, the Government should have proven this fact. It will not be presumed."

It is evident that this quotation and the doctrine announced has no application to the disposition of the bellies here in question, where the method of disposition was not a prudent selection, but was one necessarily involving speculative risks and uncertain results.

That the decision to ship the product abroad was not a prudent or wise decision is largely and substantially shown by the results of sales made there in comparison with sales in this country.

It is therefore respectfully submitted that this claimant is not entitled to recover damages on account of the sales made in foreign countries, because of the lack of due diligence, care, and prudence in the selection of the market upon which disposal was made of the unsmoked bacon here involved, and because its choice of a market involved a hazardous and speculative undertaking, when recent experience in domestic markets indicated substantial prices.

Its cross appeal should be dismissed.

II

No tender of Army bacon for March, 1919, delivery was made by claimant as in law would amount to delivery of the same

Claimant in its reply brief at page 59 (Point IV) contends that the alleged contract of sale between claimant and the Government for Army bacon to be delivered in March, 1919, was taken out from under the provisions of any statutory requirements as to form and substance, by virtue of performance.

In the court below this claimant vigorously contended that the letter of March 5, 1919 (R. 41), and the letter of March 7, 1919 (R. 46), passing between the Government and the claimant, did not constitute any kind of contract, and stood firmly upon an alleged contract based upon the letters of November 12, 1918 (R. 36), and December 10, 1918 (R. 39), passing between the Government and the claimant.

However, it now contends that the claimant, principally by virtue of the letter of March 7, 1919, made such a tender of a completely manufactured article as amounted to delivery.

Even a passing examination of the terms of that letter shows affirmatively that the claimant, as of the date of the receipt of the letter of March 5th, had not put itself in a position to make such a tender as amounted to delivery.

This is shown beyond controversy by the expression contained in the letter itself, which is as follows: " We offer for delivery *during March* " certain amounts of bacon then set out in detail.

This is followed by a statement of the condition of the bacon at that time:

> All of the above product was in smoke, or in cars awaiting to be canned, when we received your letter of March 5th. We presume you will issue purchase orders promptly.

From its own declaration as of the time of the alleged tender it appears that some of the bacon was not as yet even completely smoked and none of it had been canned, which operation was essential to the preparation of Serial 10 bacon. (R. 43.)

It is apparent that this claimant was not then in a position to contend for the application of any doctrine involving complete manufacture of the product to be delivered.

It is true that again on March 14, 1919, the record shows (R. 47) that the claimant again wrote the General Supply Depot at Chicago with reference to this bacon, but it is apparent that the record still does not disclose that the bacon had been completely manufactured and prepared for delivery, and all reasoning is against this conclusion when it is recalled that only one week had expired since it had stated that some of this product was still in smoke and some in cars awaiting to be canned, and furthermore, that more than four million pounds of the product were involved. Furthermore, this matter is closed by reference to the letter of March 22nd from the claimant (R. 47), where even at that late date all that it can say is, "At the present time we have these amounts *practically* all packed and ready for delivery." It is clear there was no final completion of the contract at the time of the alleged tender. After March 22 the record shows no further tender, and furthermore, in reply

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to their letter of March 14 General Kniskern had told them no acceptance could be made until a price had been agreed upon.

On this state of the record, no finding can be had, or any inferential finding made, that there had been completion of manufacture. Furthermore, General Kniskern immediately wrote claimant that no bacon could be received until a price had been agreed upon and purchase orders had been prepared.

So the following situation is found, that before the bacon had been completely manufactured and before any price for the same had been agreed upon the letters of March 7 and March 14 from this claimant are claimed to constitute such a delivery as would pass title to the Government.

Nor has the question of inspection anything to do with this decision. The record discloses (R. 45) that the regular governmental inspection was to have been withdrawn March 10, 1919, and that it was continued at the request of the claimant.

In the first place, by virtue of the decision in *Grant* v. *United States*, 7 Wall. 331, 336, this Court has held that the question of inspection prior to the completion of the contract constitutes no acceptance. Further, it is apparent that inspection of an incomplete article can never amount to acceptance of the completely manufactured article so as to give full effect to the provision that the goods are subject to inspection.

Driven from pillar to post as to the grounds of its right to recover and of the Government's liability, the claimant once again, to use its favorite expression, "grasps at straws" and seeks application of doctrines of law which in their very terms deny recovery. The authorities cited do say that complete manufacture of the article and tender of the same has been in some cases held to constitute delivery so as to entitle claimant to sue for the contract price. But by inescapable inference, and in some cases by outright statement, these cases further establish that, in the absence of such complete manufacture and tender at the place of delivery, no such doctrine has application.

It is respectfully submitted that the title to the Army bacon for March delivery never in any form vested in the Government, and that no subsequent sale of the same was ever for the account of, or in behalf of, and by direction of any authorized governmental agent. The only evidence in the record of direction by the Government is General Kniskern's letter of August 29, 1919 (R. 48), where in terms he states he has no authority to give the claimant instructions as to disposition. Such disposition and sale as was made was made on the claimant's own initiative and in its own interests, under conditions which at law amount to without notice to the Government. This last conclusion follows, because General Kniskern in terms stated to the claimant in his letter of August 29th that he had no authority to direct the disposition of the product.

His suggestion for immediate sale was clearly one lacking authority to bind the Government.

Accordingly, it is respectfully submitted that the title to these goods never did pass to the Government; that they were sold without official instruction from the Government at a date five months subsequent to the proper time of their disposition, if there had ever been any liability on the Government in this connection. No such liability is shown in this record because of lack of a valid contract between the parties, lack of performance of any alleged contract, so as to take it from without the requirements of the law.

Section 120, National Defense Act, does not apply

Claimant advances the contention that the transactions between it and the Government with reference to this bacon fall within the provisions of the National Defense Act, section 120 (Act of June 3, 1916, c. 134, 39 Stat. 166, 213.)

In this Act the President was authorized to place an order for needed supplies with any firm, the performance of which order was made obligatory upon the firm or corporation.

This method was "in addition to the present authorized methods of purchase and procurement."

The answer to this contention is, first, that the method or procedure described in the statute was not made use of in this case, but that certain letters passed between the alleged contracting parties. Secondly, it will be noted that Section 120 in no

manner did away with the other methods of procurement and purchase, namely, by contract or attempted contract.

On the facts here disclosed, it is evident that if ever any obligation arises, it is by virtue of an attempted contract on the part of the Government and Swift & Company, and that Section 120 has no application. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 77.

IV

The Dent Act does not apply

At page 105 of its brief (Point VI), this claimant still urges that the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) applies. It bases its contention upon an alleged contract to take capacity from Swift & Company arrived at in a conference on November 9, 1918.

This contention is foreclosed by one outstanding fact. The very first transaction between Swift & Company and the Government subsequent to that meeting shows these conditions: That Swift & Company made offers of 21,500,000 pounds of bacon and the Government did not accept this offer as to that quantity, but that General Kniskern by his letter of December 10, 1918, now contended to have been a valid acceptance of that offer, requested delivery of only 17,500,000 pounds.

Swift & Company made no objection on the ground that its capacity was not being taken, and

evidently the Quartermaster Depot at Chicago, which had held the conference of November 9, did not consider itself bound to take Swift's capacity.

This one fact negatives any conclusion that either one of the parties thought they had a contract for capacity. Therefore, the whole argument as to the application of the Dent Act must fail.

V

CONCLUSION

It is respectfully submitted that, neither on account of its cross appeal, nor because of any application of either Section 120 of the National Defense Act, or of the Dent Act, nor by reason of any legal tender and delivery of any bacon for March, 1919, delivery, is this claimant entitled to recover judgment against the Government.

Accordingly, the judgment herein heretofore entered by the Court of Claims should be set aside and the petition dismissed.

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NOVEMBER, 1925.

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